CA NO. 04-99003

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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TERRY JESS DENNIS, by and through KARLA BUTKO, as Next Friend,

Petitioner-Appellant,

vs.

MICHAEL BUDGE, Warden, and BRIAN SANDOVAL, Attorney General of the State of Nevada,

Respondents-Appellees.

D.C. No. CV-S-04-0798-PMP-RJJ
(Nevada, Las Vegas)

REPLY TO OPPOSITION TO MOTION FOR STAY OF EXECUTION

EXECUTION SCHEDULED FOR JULY 22, 2004, 9:00 P.M.

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Appellant Terry Dennis, through Karla Butko as next friend, submits the following reply to the state's opposition to the motion for stay of execution.

The state respondents argue at length in the opposition that a stay should be denied because the next friend does not have standing to appear on Mr. Dennis' behalf. Opp. at 1-5. That issue is the subject of the briefing that has been submitted to the Court and appellant will not repeat those arguments here. Appellant recognizes that, in cases involving disputed next friend standing, the standard for a stay is essentially intertwined with the standard for resolution of the standing issue, as Judge Thompson indicated in Vargas v. Lambert, 159 F.3d 1161, 1166 (9th Cir. 1998), stay vacated, 525 U.S. 925 (1998). In this case, a hearing was held in the district court, in which the only psychiatrist who examined Mr. Dennis to determine if he is competent to seek execution, Dr. Bittker, concluded that his decision is a product of his mental illness rather than his own volition. XI ER 1859-1860. Appellant has also presented substantial argument that the state court finding of competence is not entitled to a presumption of correctness, under this Court's decision in Taylor v. Maddox, 366 F.3d 992, 998-1008 (9th Cir. 2004).

Given the uniquely unequivocal nature of Dr. Bittker's testimony, XI ER 1856-1860, this is a case in which the standard of Rees v. Peyton, 384 U.S. 312, 314 (1966) (per curiam) is satisfied and next friend standing must be found. Under the terms of Rees, there can be no dispute that appellant has made a sufficiently substantial

showing to warrant a stay of execution pending disposition of the appeal. E.g., Barefoot v. Estelle, 463, U.S. 880, 893 n. 4 (1983).

In fact, this case would satisfy the standard for a stay pending application for certiorari as well, even if the appeal were resolved against next friend standing in this Court. Under Barefoot, a stay pending application for certiorari should be issued when there is

> a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.

Barefoot, 463 U.S. at 895-896 (citations omitted).

If this Court were to reject the claim of standing in this case, it would have to hold essentially that the Rees standard had somehow been abrogated; and that would create a conflict among the Circuits (as well as with Rees itself), since the decision in Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1985), was based on the continuing vitality of Rees. Such a conflict presents the strongest case for a grant of certiorari. See Sup. Ct. Rule 10(a). Under these circumstances, it is both appropriate and necessary for this Court to impose a stay of execution to allow full litigation of this issue.

The state also argues that a stay should be denied based on the alleged absence of constitutional claims in the petition. Opp. at 6. This argument is misdirected. Unlike other procedural issues, the question of standing is jurisdictional, and the strength of the underlying issues in the case cannot be considered in resolving the issue. E.g., United States v. Williams, 514 U.S. 527, 530 n.2 (1995). Even assuming that the merits could be considered, the most this Court could do in the course of resolving the jurisdictional issue would be to take a "quick look" at the underlying merits to satisfy itself that there is a facial allegation of denial of a constitutional right. E.g., Valerio v. Crawford, 305 F.3d 742, 767 (9th Cir. 2003) (en banc). The substantive claims alleged in Mr. Dennis' state petition, VII ER 1158-1162, VIII ER 1174-1290, and raised on the appeal from denial of post-conviction relief, IX ER 1540-1542, are incorporated in the federal petition, I ER 7, and they certainly survive a "quick look."[1]

The state contends that the constitutional claims are unexhausted because Mr. Dennis "voluntarily" dismissed the appeal from the denial of state habeas corpus relief. Opp. at 6-7. The state's argument assumes the question at issue before this Court. If Mr. Dennis is not competent to seek execution, his action in dismissing his

[1]In light of Dr. Bittker's testimony that the legal proceedings are simply Mr. Dennis' "vehicle for suicide," XI ER 1857, the claim that the guilty plea was involuntary, I ER 7, VIII ER 1204-1213, is certainly substantial.

appeal – which was designed to bring about his execution – would also be invalid and could not erect a procedural impediment to consideration of his claims in the district court. If Mr. Dennis' decision to seek execution is valid under Rees, then of course this Court would have no occasion to consider the merits of any claim.

In either event, the state's attempt to burden this litigation with non-jurisdictional procedural objections has no bearing on the propriety of granting a stay: the district court on remand can consider and dispose of non-jurisdictional issues if further proceedings on remand are required. The only relevant consideration at this point is whether Mr. Dennis should be executed before the litigation of the issue of next friend standing is finally resolved; and under the Barefoot standard, the circumstances of this case require granting a stay.

Respectfully submitted this 16th day of July, 2004.

FRANNY A. FORSMAN
Federal Public Defender

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CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Federal Rules of Civil Procedure, the undersigned hereby certifies that I am an employee of the Office of the Federal Public Defender and on this 16th day of July, 2004, I served a copy of the foregoing REPLY TO OPPOSITION TO MOTION FOR STAY OF EXECUTION by mailing a copy thereof to:

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